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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 154

CHRISTIAN A. JOHNSON AND CAMERON BIEWEND INDIVIDUALLY AND AS A COMMITTEE OF THE COMMON STOCKHOLDERS OF ELECTRIC POWER & LIGHT CORPORATION, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION
AND
ELECTRIC POWER & LIGHT CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 288-289) was entered on December 23, 1952, and has not

been reported. The opinion of the Court of Appeals (R. 305-312) is reported in 210 F. 2d 585.

JURISDICTION

The judgment of the Court of Appeals was entered on February 25, 1954 (R. 313); rehearing was denied March 23, 1954 (R. 317). The petition for a writ of certiorari was filed on June 21, 1954. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254 and 2101, and 15 U.S.C. 79k.

QUESTION PRESENTED

Whether a committee of common stockholders which unsuccessfully opposed a plan of a registered holding company for compliance with Section 11 of the Public Utility Holding Company Act of 1935 is entitled as a matter of law to receive larger compensation from the estate than the amounts allowed by the Commission and approved by the courts below.

STATUTE INVOLVED

The pertinent provisions of the Public Utility Holding Company Act of 1935 are set forth in Appendix B of the petition.

STATEMENT

This petition involves an evaluation of petitioners' services by the Securities and Exchange Commission in a proceeding for the reorganization of Electric Power & Light Corporation ("Electric"), a registered holding company, pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935. Petitioners constituted one of three groups representing public holders of common stock of Electric (R. 217). They applied for

an order requiring Electric to pay fees and expenses aggregating approximately $65,000. The Commission allowed approximately $21,000, and denied the balance (R. 268-269). The decision of the Commission was enforced by the United States District Court for the Southern District of New York (R. 289-292), and in this respect the court below affirmed (R. 313).[1]

The plan provided that Electric would

> pay such fees and expenses as the COMMISSION shall find it appropriate for ELECTRIC to pay and as shall have been approved for payment by ELECTRIC by order of the COMMISSION or, in the event of judicial review, by final judgment of the court. (R. 35)

The plan was approved by order of the Commission dated March 7, 1949 (R. 36-41), subject to a specific reservation of jurisdiction "to determine the reasonableness and appropriate allocation of all fees and expenses and other remuneration incurred or to be incurred in connection with the said Plan, as amended, and the transactions incident thereto," other than certain fees separately approved as part of the plan (R. 38).

The plan was enforced by order of the United

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[1] The court below reversed the decisions of the District Court and the Commission with respect to a fee which Electric Bond and Share Company ("Bond and Share"), Electric's parent, proposed to pay to another claimant, holding that the Commission was without jurisdiction to pass upon fees payable by the parent of the company in reorganization. On that jurisdictional issue the Commission has petitioned for certiorari. *S.E.C.* v. *Drexel & Company,* No. 153.

States District Court for the Southern District of New York (R. 301, Item 15),[2] which was affirmed on appeal. *In re Electric Power & Light Corporation,* 176 F. 2d 687 (C.A. 2), stay denied, 337 U.S. 903.

During the years 1945-48, Bond and Share and Electric submitted to the Commission, pursuant to Section 11(e) of the Act, plans for the dissolution of Electric to comply with Section 11(b)(2) of the Act and with an order of the Commission thereunder dated August 22, 1942. *Electric Bond and Share Company,* 11 S.E.C. 1146, Holding Company Act Release No. 3750, affirmed, *American Power & Light Co.* v. *S.E.C.,* 141 F. 2d 606 (C.A. 1), affirmed, 329 U.S. 90. The plan ultimately approved and consummated was filed by Electric in March 1948 (R. 4-28), and was amended in March 1949 (R. 34-35).

Petitioners organized themselves as a committee in April 1948 (R. 48), and thereafter opposed the plan before the Commission and in court (R. 239-246). They filed counter proposals which in effect constituted their own plan (R. 240-241; R. 300, item 9, p. 93). Another committee for the common stockholders of Electric, the Sincoff Committee, appeared in the proceedings at about the same time to oppose the company's plan (R. 242). Petitioners

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[2] This reference is to a stipulation as to the contents of the record on appeal in the court below. Not all of the stipulated record was printed there, nor is it all printed in the record before this Court. The entire record before the court below has been transmitted to the Clerk of this Court and is available for reference.

opposed primarily the allocation ratios proposed in the plan; the Sincoff Committee took the leading role in opposing the proposed settlement of claims against associate companies (R. 246-247).

A third group of public holders of the common stock appeared in support of the plan (R. 250). A preferred stock committee, an individual preferred stockholder, and two groups of second preferred stockholders also participated in the proceeding, as did Bond and Share whose primary interest was in the common stock (R. 216, 220-221).

The only change in allocations after the filing of the plan in March 1948 was a relatively minor increase in the allocation to the second preferred stock (R. 34-35). Every contention of the petitioner Committee was completely rejected by the Commission and by the courts which reviewed the Commission's decision (R. 243). The one witness produced by the Committee merely supplied fallacious analyses of company figures, and unrealistic projections of system earnings (R. 240, 244-245).

During the Commission proceedings in Washington, petitioners were represented by Burns, Blake & Rich, a Boston firm (R. 242-244). Burns and other members of the firm were members of the New York bar, and the firm maintained an office in New York (R. 245). About 40% of their time was devoted to the case after the close of the Commission proceedings (R. 243). Nevertheless, in connection with the court proceedings in New York petitioners retained additional counsel (R. 245). As stated above, petitioners' objections to court en-

forcement were wholly rejected and the enforcement order was affirmed on appeal.

After consummation of the plan, applications for allowances were filed pursuant to the plan, and were considered by the Commission pursuant to its reserved jurisdiction. The amounts sought aggregated $1,320,000 including the $65,000 sought by petitioners (R. 217). The Commission approved and directed the payment of approximately $590,000 by Electric (including $21,000 to petitioners) and $250,000 by Bond and Share (R. 268-269). The allowance to petitioners included a fee of $9,500 to Burns, Blake & Rich; expenses of Burns, Blake & Rich in the amount of $2,770.06; expenses of additional counsel in the amount of $1,049.79; and other committee expenses of $7,563.10. No allowance was made for a fee for the additional counsel retained, or for the witness produced. The Sincoff Committee was allowed $9,500 for a counsel fee, $1,500 for a financial consultant, and $2,037.37 for other expenses. No allowance was approved for the group of common stockholders that supported the plan.

ARGUMENT

1. The decision below does not involve any issue of law on which further review would be appropriate. The restrictive "benefit rule" which petitioners claim was applied would have resulted in denial of any claim of petitioners and other common stock representatives, since there was no tangible benefit to the common stockholders and no change in the plan as a result of their wholly

unsuccessful participation in the reorganization proceedings before the Commission and in the courts. In fact, the Commission authorized and directed payment of approximately $35,000 to common stock representatives, of which petitioners received $21,000.

2. The standards applied by the Commission are set forth in its Findings and Opinion (R. 223-228). The Commission there stated its major objective "to protect estates in reorganization from exorbitant charges and at the same time grant fair compensation to those participating in the proceedings so as to afford adequate public representation in the reorganization process" (R. 223). The Commission went on to state:

> Compensation may be paid for services which have contributed to the plan ultimately approved, which have contributed to the defeat of a proposed plan found to be unsatisfactory, or which have otherwise directly and materially contributed to the development of the proceedings with respect to the plan. In determining the amount of compensation to be allowed, the primary factor is the amount of benefit conferred upon the estate or its security holders by the services rendered. Among other factors to be considered are the necessity of the services, duplication of efforts, the intricacy and magnitude of the problems involved, the time necessarily required to be expended, the experience and ability of applicants, the size of the estate and its ability to

> pay, conflicts of interest, the extent to which the applicant's efforts were directed to or motivated by personal or special interests, and the extent to which the applicant's efforts unreasonably delayed or were deterimental to the proceedings.

The standards are applied in the Commission's discussion of the services rendered by the petitioners (R. 239-244). The Commission discussed the positions taken and evidence introduced by them, the desirability of having the public common stockholders of Electric represented independently of Bond and Share, and the fact that two independent committees for public common stockholders had appeared in the proceedings at substantially the same time. The Commission went on to state:

> Since neither of these committees was successful, we believe that any compensation to either committee not only must depend on whether the committee functioned efficiently, and properly and diligently represented the interest of its class, but also must reflect the consideration that the aggregate compensation for independent representation, not resulting in any tangible benefit to the class, must be modest.

The allowances to Burns, Blake & Rich for a fee, and the reimbursement of the expenses incurred by that firm, were held to be "appropriate compensation in the light of the failure to achieve any sub-

stantive results, bearing in mind the size of the estate and the complexity of the problems involved" (R. 243).

The Commission found that the analyses and testimony of the petitioners' expert witness "did not in any way aid the Commission, and that such services were not essential or even useful to the protection of the interests of the common stockholders. While we believe it proper that a Committee avail itself of the services of an independent expert, it is also our view that the estate should not be saddled with the payment of any fee for computations which, however complex, are based upon fallacious analytical foundations." (R. 244-245). The Commission also found that petitioners' retention of additional counsel after the conclusion of the administrative proceedings "necessarily entailed a great deal of duplicative work for which we do not believe the estate can properly be charged." Accordingly, the Commission allowed only the expenses incurred by the witness and by the additional counsel, but refused to require the estate to pay fees for such useless and duplicative services (R. 245, 246).

The District Court, in overruling petitioners' objections to the Commission allowances, found and concluded that the Commission's findings of fact and conclusions of law were "supported by substantial evidence and were arrived at in accordance with legal standards." (R. 291.) The court below agreed with the District Court in this respect (R. 310-312).

3. The petition seeks to convert an issue as to value of services into a question of law by confusing several conflicting concepts under the phrase "benefit rule". The more restrictive concept of "benefit" as excluding any compensation at all for unsuccessful activities in opposition to a plan has produced dispute in the courts, but is not involved in this case. The general concept that compensation must be measured primarily by benefit to the estate is embodied in most of the authorities cited by the petitioners.

For example, the petitioners' first quotation from Collier on *Bankruptcy* (Petition, p. 16) is preceded by the statement in the same paragraph (Collier on *Bankruptcy,* 14th Ed., Vol. 6, p. 4506) that

> The principal test, however, is the benefit to the debtor's estate and the security holders generally.

The petitioners' other quotation from Collier (Petition, p. 16) is immediately preceded by the statement (p. 4537):

> Here again, however, no allowance will be made unless the services or costs have resulted in some "benefit to the estate."

In re Engineers Public Service Company, 116 F. Supp. 930 (D. Del., 1953), appeal pending, cited at pages 15-16 and 19 of the petition, involves a total denial by the Commission of compensation and reimbursement of expenses for unsuccessful court

litigation by counsel who had not participated in the proceedings prior to the Commission's decision on the plan. The District Court there held (116 F. Supp. at 938):

> Under the authorities, I conclude benefit has been conferred upon the estate within the purview of the Act.

Similarly, in *Heenehan* v. *Prudence Realization Corp.*, 108 F. 2d 103, 104 (C.A. 2, 1940), the court states:

> * * * all that we now decide is that if the Superintendent's appeal was a benefit to the estate, the judge had power to make a commensurate allowance for the services rendered.

In short, these authorities do not reject the view of the Commission and of the courts below that the primary factor in determining the amount of compensation to be allowed is the amount of benefit conferred upon the estate or its security holders by the services rendered. Rather, they accept the view applied by the Commission in this case, that modest compensation may be allowed for the proper and diligent representation of the interest of a class, though unsuccessful in changing the plan.

4. The petition's discussion of the testimony of the witness who was allowed his expenses but no fee is misleading as well as irrelevant. The testimony he gave is not printed in the record, but is accurately described in the Commission's Findings

and Opinion (R. 240, 244-245). The projections of earnings to which his testimony was principally devoted were based upon analytical fallacies and have not been borne out by subsequent events. The changes in market values since consummation of the plan do not support his testimony or his conclusions, and would be irrelevant even if the fairness of the plan were to be reconsidered five years after its approval and consummation. Cf. *S. E. C.* v. *Central-Illinois Securities Corp.,* 338 U. S. 96, 148.

The petition notes that since consummation of the plan in 1949 there have been substantial increases in the market values of the common stocks of United Gas Corporation and of Middle South Utilities, Inc., distributed pursuant to the plan to holders of the preferred, second preferred, and common stocks of Electric (Pet. 23-25).[3] It ignores the facts that there have been tremendous changes in the capital structures of those companies during the 5-year interval through sales of securities and retention of earnings, and that there has been a concurrent rise in the market value of utility common stocks generally. It is of the essence of a common stock position that market values will fluctuate, whether such securities are purchased for cash or acquired in exchange for other securities.

Thus, according to the Dow-Jones Utility Averages, an investor in utility common stocks gen-

[3] The securities distributed to the common stockholders of Electric which had a market value of $90,000,000 to $100,000,000 in July, 1949, had a market value of approximately $175,000,000 as of July 1, 1954.

erally, who invested $185 in such stock on July 1, 1949, about the time the Electric plan was consummated, and retained his investment through July 1, 1954, would find that it had increased in value to approximately $312.[4] This does not mean that the sellers of utility stocks during the earlier period received less than their equitable equivalent in cash, or that the purchasers received an unfairly large number of shares for the investments they made. Similarly, a holder of a share of $7 Preferred Stock of Electric, with a liquidation preference of $189.71 and a redemption price of $199.71, received under the plan common stock with a then fair value equal to the fair value of the rights he surrendered. The valuation of his claim suggested by Electric's financial consultant was $185;[5] if he sold the stock received in exchange for it in July 1949 he would have received approximately $170 in cash at the low market price for the month, or $190 at the high market prices for the month, less the cost of sale.[6] If he retained the stock, its market value has increased along with the values of other common stocks to $332 as of July 1, 1954.

It is quite true, as stated by the court below, that

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[4] The Dow-Jones Utility Average was 34.66 on July 1, 1949, and 58.41 on July 1, 1954.

[5] The Commission did not place a dollar valuation upon the claim, but found that the shares of United and Middle South common stock to be issued in exchange for the Electric preferred stock constituted the equitable equivalent of the rights to be surrendered (R. 300, item 9, p. 67). Cf. *S.E.C.* v. *Central-Illinois Securities Corp.*, *supra*, 338 U.S. at 143.

[6] During July 1949 the United common stock sold at prices from $15⅞ to $17⅞ per share, and the Middle South common stock at prices from $14¾ to $16⅜ per share.

an intelligent estimate may turn out to be less accurate than an uninformed guess (R. 311). However, the claim of the petitioners that their guesses and those of their witness have been proven sound is not borne out by the facts. The relevant estimates involving prediction were the estimates of earnings applicable to the capital then invested in the enterprise. The Commission did not try to estimate market values five years after consummation of the plan, and such estimates would have had no bearing upon the questions at issue in the reorganization.

CONCLUSION

The case was correctly decided by the court below. The decision is not in conflict with holdings in other circuits, and there is no need for further review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JULY, 1954.

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